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May 17, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 29, 2004
Case No.: TIA-0300

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a laborer, data analyst and a quality control specialist at the DOE's Rocky Flats Plant (plant) for approximately 26 years, from 1966 to 1992.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of one illness, prostate cancer. The Applicant claimed that his illness was the result of being exposed to radiation and toxic substances during his work at the plant. The Applicant also filed a Subpart B claim with the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The NIOSH report found a probability of causation of less than 50 percent.

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Applicant had prostate cancer, but concluded that the disease was not likely related to toxic exposure at the DOE site. Citing information contained in the NIOSH report, the Panel concluded that the Applicant was exposed to a relatively small amount of radiation. It also noted that the association between prostate cancer and radiation is weak.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant asserts that the dosimetry records at the plant were incorrect and underreported his radiation exposure. He also contends that the Panel erred in stating that he was a quality certification specialist for the duration of his employment at the plant. The Applicant states that he was only employed in that capacity from 1989 to 1992.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's disagreement with the accuracy of his dosimetry records does not demonstrate Panel error. The Panel bases its medical conclusion on the information that is contained in the record. The Panel explained the reasoning for its conclusion and its conclusion is consistent with the NIOSH report. If the Applicant wishes to challenge the NIOSH dose reconstruction, he should raise the matter with the DOL.

The Applicant's assertion that the Panel incorrectly characterized his employment at the plant does not demonstrate Panel error. The Panel listed the Applicant's

job titles and the dates of his employment at the plant. Accordingly, the Panel considered the job duties of the Applicant in his various positions, not simply his duties as a quality certification specialist.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0300 be, and hereby is, denied.
- (2) The denial pertains only to this appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 17, 2005